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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 IN RE:

4
5 TERRORIST ATTACKS ON
SEPTEMBER 11, 2001

03 MDL 1570 (GBD) (FM)

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7 New York, N.Y.
8 March 19, 2013
11:51 a.m.

9 Before:

10 HON. FRANK MAAS,

Magistrate Judge

11 APPEARANCES

12 COZEN O'CONNOR

Attorneys for Plaintiff Federal Insurance

13 BY: SEAN P. CARTER, ESQ.

J. SCOTT TARBUTTON, ESQ.

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Committee

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(In open court)

(Case called)

MR. KABAT: Alan Kabat for the defendant Al Haramain.

MR. McMAHON: Good morning, your Honor. Martin McMahon for Rabita Trust and for the individual, Wa'el Jelaidan.

THE COURT: Good morning.

MS. BERGOFFEN: Good morning. Roni Bergoffen on behalf of Dubai Islamic Bank.

MR. HAEFELE: Morning, your Honor. Robert Haefele from Motley Rice for the Burnett plaintiffs and the EuroBroker, PC.

THE COURT: Good morning.

MR. GOLDMAN: Good morning, your Honor. Jerry Goldman, Anderson, Kill, for the O'Neill plaintiffs and the plaintiffs' executive committee.

THE COURT: Morning.

MR. CARTER: Morning, your Honor. Sean Carter from Cozen and O'Connor for the Federal Insurance plaintiffs.

THE COURT: Good morning.

MR. MALONEY: Good morning, your Honor. Andrew Maloney for the Ashton plaintiffs.

MR. TARBUTTON: Good morning, your Honor. Scott Tarbutton from Cozen O'Connor, Federal Insurance plaintiffs.

MR. FRUTIG: Good morning, your Honor. Brian Frutig

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1 from Motley Rice for the Burnett plaintiffs.

2 MR. NOLAN: Morning, your Honor. Ken Nolan, Speiser,
3 Krause for the Ashton plaintiffs.

4 THE COURT: Well, there are three motions before me.
5 Before we get to the first of them, I've tried to proceed with
6 letter briefing rather than formal motion papers, but I seem to
7 be a victim of my own effort to be more informal here. One of
8 the sets of moving papers, I think it's Al Haramain, is a
9 letter that's 22 pages long; so it's the equivalent of a
10 44-page, double-spaced memorandum.

11 And as to any future letter applications, I'm going to
12 require that any moving or opposition papers be limited to 12
13 pages if the letters are single spaced; 25 pages, obviously, if
14 they're double spaced. And any replies are to be no more than
15 five pages single spaced and ten pages double spaced.

16 I guess an appropriate way to start is with the
17 Al Haramain application first.

18 MR. HAEFELE: Thank you, your Honor. It's Robert
19 Haeefe from Motley, Rice. Your Honor, plaintiffs, as you can
20 tell from the moving papers, are requesting sanctions versus
21 Al Haramain for the failure to comply with three orders of your
22 Honor; the oral order in the transcript of October 8, 2010, and
23 in the transcript of December 2, 2010, as well as your Honor's
24 written order confirming those, an order of December 10, 2010.

25 And, also, for the related failures to produce

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1 responsive documents to document requests served on the
2 defendant 7-31-2012. Perhaps the primary difficulty, your
3 Honor, that the plaintiffs have faced in this litigation has
4 been what has become apparent as a unified defense scheme,
5 where the defendants, pretty much across the board, are
6 refusing to produce documents unless we come to your Honor and
7 insist that they produce the documents.

8 And I think that's what we're faced here today with
9 one of those defendants, Al Haramain, who has been a repeat
10 offender of violating your Honor's orders. Throughout the
11 entire litigation, no defendant has voluntarily disclosed any
12 documents unless it was absolutely obligated to disclose. They
13 haven't disclosed anything under the traditional Federal Rules
14 of Civil Procedure obligations.

15 And I think, as your Honor has said at one point, the
16 disclosure documents in response to the document requests under
17 the federal rules is not something that we should be obligated
18 to come and pursue before your Honor in every instance. It's
19 an obligation to respond to the documents in the document
20 production requests and produce documents, unless there is a
21 particular issue that can be brought before your Honor and a
22 particular dispute. That's not really what we've been facing.
23 What we've been facing is pretty much wholesale nondisclosure
24 and forcing us to come to your Honor for huge swaths of
25 documents responsive to the requests.

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1 THE COURT: Part of your argument is that if
2 Al Haramain had taken seriously its preservation obligations,
3 it would have preserved documents and had them available for
4 production before it was locked out both in Oregon, by virtue
5 of the execution of the search warrant, and in Saudi Arabia. I
6 guess they literally were locked out of the premises of the
7 parent foundation.

8 But even if they had taken steps to preserve
9 documents, unless they moved them off site, which I'm not sure
10 necessarily would have occurred to somebody being called upon
11 to produce documents, the same result would have obtained;
12 would it have not?

13 MR. HAEFELE: I think I understand, your Honor, and I
14 would go -- I'm not sure that I would agree with you in terms
15 of limiting it.

16 THE COURT: Part of what Al Haramain is saying is,
17 gee, we'd love to comply, we just can't, somebody padlocked the
18 doors in Saudi Arabia. And part of the response here is, well,
19 the Saudi Arabian entity is not even being represented here; so
20 we're just dealing with the Oregon entity, where all of the
21 documents were taken by the U.S. Attorney's Office. Correct?

22 MR. HAEFELE: Just so I'm clear, you're characterizing
23 what you understand their argument to be, correct?

24 THE COURT: Yes.

25 MR. HAEFELE: And I think what your Honor is saying is

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1 a correct characterization of what their argument is. I just
2 want to be clear that their obligation to collect and preserve
3 the documents is only an element. I mean, we would also take
4 the position that -- particularly as is evidenced by the recent
5 circumstances. There's also the fact that if even after they
6 were seized by the U.S. government, they're still their
7 documents, and when we requested them, they had an obligation
8 to go and get them.

9 I think, as we've seen, there's been this tremendous
10 delay in going after those documents. And, yet, when they
11 asked for them, it took two weeks to get, but it took many,
12 many months and over years for them to go.

13 Setting that aside, I think the -- what your Honor has
14 characterized is true, that there was a failure during the
15 early part of the litigation for them to secure the documents,
16 perhaps put them in their lawyers' hands if there was some
17 concern over, you know, what objections there would be to
18 production of those documents. That's certainly something that
19 the lawyers could have worked out once they were secured and
20 ready to be produced in a timely manner

21 THE COURT: But that's my point. That would have
22 required them to anticipate that somebody would seize the
23 documents or seal them out of their offices in the Saudi
24 Arabia, where I'm not sure -- if this were purely a domestic
25 case and it didn't have all the complications of this one, I'm

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1 not sure if preservation requires removal. That was the only
2 point I was trying to make.

3 But, I mean, Aiken I guess it is now, has entered an
4 order saying, you know, have at it. Does that move the ball
5 forward here or what?

6 MR. HAEFELE: Well, certainly, we're not going to turn
7 the document away, no. Of course, we want the documents, your
8 Honor.

9 THE COURT: Right.

10 MR. HAEFELE: But as I was alluding to a moment ago, I
11 think the current circumstances evidence only more the
12 propriety of imposing sanctions as a result of -- it's just one
13 more example of how the immense delays that have been built
14 into the scheme that's been going on in this litigation for
15 years, to delay, to prevent any access to documents in any
16 manner to the plaintiffs until they're absolutely pushed with
17 their backs to the wall before they will give any documents.

18 And in this circumstance, it wasn't until they were
19 actually responding to our second motion in this litigation
20 against Al Haramain, the second motion against Al Haramain,
21 that they finally said, oh, let's go and write to the Judge.
22 Instead of -- you know, it was in response, their reply brief
23 that they were working on at the time, that they sent the
24 letter to the lawyer out in Oregon, and within two weeks the
25 documents were produced. And now they want to drag it out even

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1 longer.

2 THE COURT: When you say within two weeks the
3 documents were produced, I want to make sure I understand it.

4 MR. HAEFELE: To the defendants in this litigation.
5 We still don't have them.

6 THE COURT: But your understanding is they do?

7 MR. HAEFELE: Your Honor may not be aware there was a
8 filing yesterday by Al Haramain that indicated that they now
9 have -- as of earlier this month, they have received a number
10 of CDs with the documents from that litigation. And they're in
11 the possession of, I'm assuming Mr. Kabat's office, but his
12 position is that he wants to take some time to review the
13 documents and do a rolling production.

14 Our position is we want them to produce the documents.
15 We want the CDs now. We don't want a delay. Mr. Kabat is
16 saying what he wants to do is categorize which document is
17 responsive to which request. Our position is we want the
18 documents. I'm not opposed to him categorizing and fulfilling
19 the obligations under the rules, but I want him to produce the
20 documents now. He can categorize, as he is obligated to under
21 the rules, which they're responsive to, later on.

22 So in terms of why they should have seized the
23 documents early on in the litigation, there was very early in
24 this litigation that Al Haramain knew they were at the center
25 of the government's investigation. I mean, they're one of the

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1 primary examples of the 9-11 Commission report of what's wrong
2 with the charity process -- the so-called charity process in
3 the funding of terrorism.

4 And so very early on, Al Haramain knew that they were
5 going to be the subject of tremendous scrutiny, and in terms of
6 their obligations to take the documents and hold onto the
7 documents, I think that is more indicative of their obligation
8 here.

9 And I guess another piece of that is the fact that all
10 of the Al Haramain charity branches were fairly early
11 designated all over the world; so there's not really an
12 indication that they can throw up their hand and say we didn't
13 know it was us. We didn't know we were going to be focused on.
14 They knew they were going to be focused on. They knew they
15 were going to be a defendant in this litigation, and they knew
16 it was going to be worldwide.

17 THE COURT: Let me hear from Mr. Kabat, and then maybe
18 I'll get back to you. Let's start at the end of this and then
19 work our way backwards. You now have, I take it, all of the
20 documents in electronic form that were seized pursuant to the
21 search warrant?

22 MR. KABAT: I have not had to time to review all of
23 them, but there are approximately 30,000 pages of documents.
24 And I understand approximately half of those were seized by the
25 government back in 2004 and roughly the second half are those

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1 that were produced to the grand jury by the federal public
2 defender some years ago, but yet, I've not reviewed all the
3 documents.

4 THE COURT: Okay. Are there documents, to your
5 understanding, that the government seized but has not turned
6 back to you?

7 MR. KABAT: In a sense, you're asking me a negative in
8 a sense because I don't know what the Al Haramain office
9 originally had back in '02, before --

10 THE COURT: I'm not asking you to verify it. I'm just
11 asking your understanding based on your discussions with the
12 government. Do you now have, according to the government,
13 everything that was seized from the Al Haramain office?

14 MR. KABAT: In terms of paper documents, I believe so.
15 We have not yet gotten the e-mails that were taken off the hard
16 drives.

17 THE COURT: Okay. But that's --

18 MR. KABAT: That's part of our request.

19 THE COURT: -- that's coming?

20 MR. KABAT: Yes.

21 THE COURT: Okay. I have said repeatedly in this case
22 that I have not understood the delay, particularly after the
23 magistrate judge, who issued the order that Mr. Seda was
24 relying on as a basis for not producing documents, indicated
25 that as far as he was concerned, there was no problem.

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1 But we're at the stage now where you have the
2 documents. I understand that you want to review them, but
3 given the extensive delay that's occurred here, I'm not sure
4 why I should allow much time at all for that process. These
5 are, by and large, if not totally, corporate records as to
6 which there's no privilege that can be asserted.

7 So why shouldn't I simply direct that within a very
8 short period of time, ten days, 20 days, something like that,
9 you produce all of them that are responsive to the requests
10 that have been made?

11 MR. KABAT: Certainly. We can get that done, I think,
12 by the end of next week.

13 THE COURT: Okay.

14 MR. HAEFELE: Your Honor, may I be heard on one issue
15 related to that, and then I'll sit back down?

16 THE COURT: Sure.

17 MR. HAEFELE: I just want to be clear, your Honor.
18 There is a corollary set of documents -- there's three
19 categories of documents that were covered by the order, the
20 revision to the order in Oregon, one was the seized documents,
21 one was -- and I'll shortcut the term on it -- grand jury
22 documents --

23 THE COURT: Right.

24 MR. HAEFELE: -- and then one was a file by
25 Mr. Wilcox, who's the accountant. And we want to make sure

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1 that we get all three of those categories. We don't want to
2 just limit it to -- I hear -- the conversation I'm hearing is
3 limiting it perhaps, hopefully, unintentionally to just seized
4 documents. I don't know about whether the grand jury documents
5 were a set of documents that had also been seized, but I just
6 want to make sure that we're not just limiting it to that. The
7 order allowed us to have possession of all three.

8 MR. KABAT: Yes, I can confirm that the grand jury
9 documents are in that pile, and there was one CD that was
10 labeled Wilcox documents. I have not yet had the time to
11 review the Wilcox documents. He's referring to the former CPA,
12 the accountant, that did the tax returns for Al Haramain. So
13 there is one CD with the Wilcox documents, but I can provide
14 it.

15 THE COURT: And you said that the electronic documents
16 are not yet in the hands. Have you been told when you'll
17 receive those? You said you didn't have the e-mails.

18 MR. KABAT: Well, we have the e-mails that were
19 printed out. We don't have the e-mails that were not printed
20 out, and I'm going to follow up when I get back to DC tomorrow
21 afternoon.

22 THE COURT: Okay. Well, for the materials you have in
23 hand -- Off the record.

24 (Discussion off the record)

25 THE COURT: As to the materials you have in hand, I'm

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1 going to require that you produce all of the documents by
2 March 29th, and if you're claiming privilege as to any of them,
3 that you produce a privilege log on the same date.

4 As to any remaining documents, I'm going to require
5 that you produce them and, again, any privilege log by
6 April 19th. And unless you feel strongly otherwise,
7 Mr. Haefele, I'm tempted to defer a decision as to the
8 application for sanctions until we see the outcome of the
9 process I've just directed.

10 MR. KABAT: Thank you, your Honor.

11 MR. HAEFELE: I'm pausing to think about what you've
12 said, your Honor. I apologize. I think that's probably okay.

13 THE COURT: I think what I'm trying to do is save you,
14 me and Mr. Kabat another motion, if there is to be another
15 motion. If, for example, at the end of the process, although
16 it doesn't sound like that would be the case, Mr. Kabat said my
17 client had a change of heart, I'm not giving you anything, then
18 you'd want to pile on more. And there's no point in my
19 resolving the sanctions piece of the Al Haramain motion and
20 then potentially have more litigation. I think whatever
21 rulings I make concerning sanctions should be made once we have
22 somewhat full information.

23 MR. HAEFELE: I agree, your Honor, and I appreciate
24 that. The only thing I want to make sure that we're preserving
25 is the fact that our motion goes to much more than just this

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1 subset of documents, which, you know, we don't want to waive
2 our right to receive, particularly since these documents also
3 go to, for example, Mr. Seda and a number of other defendants
4 in the case potentially. So they're certainly relevant beyond
5 Al Haramain, and we would want those documents regardless of
6 whether or not there was a default entered in the sanction.

7 But, furthermore, I just need to emphasize for your
8 Honor the purpose that this doesn't address the question of the
9 non-production of anything from Al Haramain's office in Saudi
10 Arabia. It doesn't address the fact that there is destruction
11 of some of the documents, a number of the documents pursuant to
12 the conversation or the testimony of the government's witness
13 in the criminal litigation. So it still does not cover the
14 full production of the documents that ought to have been
15 produced from Al Haramain's Oregon office.

16 THE COURT: And both of those are good points. Let me
17 take them one at a time. There was information contained
18 within your motion papers that Al Haramain in Oregon
19 intentionally erased its e-mails, but there was also testimony
20 that 20 or 25,000 e-mails were recovered.

21 It was not clear to me from the transcript excerpt I
22 read, and maybe it wasn't clear to the expert who was
23 testifying, whether the government believed that all of the
24 e-mails that had been erased had been recovered. Do you have
25 any sense of that?

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1 MR. HAEFELE: My reading of it was he was very clear
2 that he was unable to recover all of the e-mails, and that he
3 was -- that he said that because of the -- There's an
4 overarching issue in that that effort, the endeavor to delete
5 the e-mails is evidence of the willfulness, and that's mostly
6 what we've included that in the brief for your Honor's
7 edification is that it demonstrates the willfulness of the
8 conduct, but in terms of --

9 THE COURT: And, therefore, in your view, should lead
10 to a presumption that that which was destroyed was relevant?

11 MR. HAEFELE: That was -- I mean, it goes to the --
12 it's one of the factors to consider in whether to impose
13 sanctions and in particular the sanction of default. But, yes,
14 I think the willfulness, I think is whether it's willful or
15 even less than willful, I think it's wanton, recklessness would
16 be sufficient for the presumption that the evidence was
17 relevant.

18 But I think that the point I was making for your Honor
19 was also that we want to make sure that we're addressing, and
20 I'm not waiving the right to come back later on to address to
21 your Honor's attention even if they produce everything that
22 they've said they're going to produce today, which I'm counting
23 on that they will, it still doesn't address the issue of --
24 they've become one of the -- I mean, you're going to hear more.

25 But they've become one of the poster children in this

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1 litigation for why the deterrence of these sanctions is
2 absolutely essential. Otherwise, we're just going to keep
3 coming back before your Honor in piecemeal motion, which I
4 think your Honor is probably getting tired of, for we need
5 more, we need more, we need more, everybody is not producing.
6 And I think that's what we'd like to be able to avoid by having
7 a little bit more openness in terms of production.

8 But I don't think that we're going to get that unless
9 they, all of the defendants, understand that there are
10 ramifications for their failure to abide by their discovery
11 obligations.

12 THE COURT: Yes. By suggesting that I defer decision,
13 I wasn't trying to suggest that I was deciding that it was a
14 circumstance of no harm, no foul.

15 MR. HAEFELE: Understood, your Honor. Thank you.

16 THE COURT: As to the Saudi Arabian part of the
17 foundation, if I can call it that, Mr. Kabat takes the view
18 that these are two separate entities. I previously made a
19 finding that it, at least for production purposes, is one
20 single entity.

21 But as a practical matter, if Mr. Kabat is taking the
22 view that the Saudi Arabian part of the foundation is not
23 represented in this litigation, in part, because he doesn't
24 have permission from the United States government to represent
25 them, and if I enter a default judgment because it seems clear

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1 that -- or recommend entry of a default judgment, I'm not quite
2 sure how that would play out. Because no documents have been
3 produced from Saudi Arabia and, indeed, it doesn't appear that
4 the Saudi Arabian piece of this is prosecuting this case.

5 Where does that get you? Do you get a default
6 judgment against something which apparently no longer exists?

7 MR. HAEFELE: Well, certainly, your Honor, the
8 presence of Mr. Kabat here representing that he represents a
9 client indicates that Al Haramain does exist in the U.S., an
10 element of Al Haramain does exist in the U.S.

11 THE COURT: Sure.

12 MR. HAEFELE: Now, I understand Mr. Kabat's view that
13 he wants to argue that they are separate, but the truth of the
14 matter is, as your Honor has indicated, your Honor has found
15 that they are an alter ego. The Ninth Circuit has found that
16 they are an indistinguishable entity one from the other. The
17 United States government when they designated all of the
18 entities, if you look at the rationale for the designations of
19 the entities, as well as the rationale for the designation of
20 Aqeel Al-Aqeel, the head of the Saudi entity, as well as the
21 head of the Oregon entity, you will see that everybody has
22 treated these as one worldwide entity.

23 Your Honor was right when your Honor said that they
24 were an alter ego. So in terms of what does it get us, it gets
25 us the fact that we can enforce one default judgment against

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1 the other, no matter which way we enforce it because of the
2 alter ego existence. But your Honor was right when he found
3 that they were alter ego, and it still -- each of the factors
4 that your Honor went through at that long hearing some years
5 ago still apply.

6 THE COURT: Okay.

7 MR. HAEFELE: I would also want to emphasize to your
8 Honor that the impracticality and the injustice of allowing
9 Al Haramain, the worldwide entity, to be present here in the
10 U.S. through their branch office for a number of years and get
11 the benefit of that presence, and then when there's an
12 obligation for them to be involved with this litigation, they
13 sever the ties and want to walk away and leave Mr. Kabat here
14 without the ability to be part of that branch, it benefits --
15 you know, it benefits Al Haramain in Saudi Arabia, I suppose --
16 at least by Mr. Kabat's argument, there's some benefit by
17 allowing that severance to exist.

18 But there is certainly no fairness to the world, the
19 rest of the world, particularly the 911 plaintiffs, to allow
20 that severance to happen. They are part of the same entity and
21 they should not be allowed to divorce themselves just for their
22 own sake.

23 THE COURT: Well, we'll talk about that more at a
24 future date. While you were talking, and when I was directing
25 Mr. Kabat to produce not only documents but any privilege log,

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1 to the extent that any privilege is claimed, it occurred to me
2 that I've never entered in this case, and nobody has ever
3 requested, a 502D order, which would enable privileged
4 documents to be clawed back.

5 MR. HAEFELE: Your Honor, you did do that.

6 THE COURT: I did?

7 MR. HAEFELE: Yes.

8 THE COURT: Oh, thank you.

9 MR. HAEFELE: And it was at your own argument.

10 THE COURT: Okay. Fair enough. Okay. Anything
11 further on Al Haramain?

12 MR. KABAT: No.

13 THE COURT: Okay.

14 MR. HAEFELE: Just so I'm clear, your Honor, you're
15 deferring the rest of the motion until another time?

16 THE COURT: Yes.

17 MR. HAEFELE: Thank you.

18 THE COURT: And one of the things we need to talk
19 about at the end of this conference is when to hold the next
20 conference.

21 Why don't we turn then to Jelaidan.

22 MR. CARTER: Good morning, your Honor. With your
23 Honor's permission, I think it might be more efficient to do
24 the motion as to Jelaidan and Rabita together, in effect.
25 There's a lot of overlap to the arguments.

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1 THE COURT: Yes.

2 MR. CARTER: I think, your Honor, to begin with, I'm
3 going to strike a theme similar to the one that Mr. Haefele
4 offered to the Court, and that is, that these motions don't
5 come before the Court in a vacuum, but rather, against a
6 broader backdrop of the difficulties that we've encountered in
7 trying to get what is essentially normal, affirmative
8 compliance with discovery obligations, as well as the series of
9 directives and admonitions that your Honor has issued both as
10 to particular defendants and the defendants at large concerning
11 what was expected of them during the discovery process and what
12 the consequences of the failure to abide by those directives
13 might be including the potential for case dispositive
14 sanctions.

15 And we've, obviously, noted in the papers the very
16 specific directive the Court issued in November of 2011,
17 indicating in the context of a motion pertaining to defendant
18 Jelaidan, but offered more broadly that there was a requirement
19 that defendants put on a full-court press, and that to the
20 extent they were going to claim the documents could not be
21 retrieved by them, they would have to be able to document
22 serious conscientious efforts to have obtained those for the
23 edification of the court and plaintiffs. So that we would be
24 able to fairly evaluate whether they had, in fact, undertaken
25 those efforts.

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1 Your Honor also issued a directive a few months
2 earlier of that year at a hearing in July of 2011, in the
3 context of motions we were litigating pertaining to Muslim
4 World League and the International Islamic Relief Organization.
5 At that time, your Honor described the production process, at
6 least pertaining to those defendants, as sort of a death by a
7 thousand paper cuts, and underscored that there hadn't been the
8 kind of affirmative compliance with discovery that you would
9 expect of defendants in litigation of this nature, that
10 certainly the discovery process didn't contemplate that we
11 would be required to come forward and then the defendants would
12 respond by merely searching out the specific items that we
13 identified as being missing from prior productions. But,
14 rather, that there needed to be a more comprehensive approach.

15 Your Honor also indicated at that time that there
16 were, obviously, some cultural and language barriers and
17 perhaps even financial barriers that had served to sort of
18 undermine the discovery process, but the defendants needed to
19 find a way to overcome those or be faced with case-dispositive
20 sanctions.

21 With regard to defendants Jelaidan and Rabita Trust,
22 the record before the Court right now is abundantly clear that
23 they have made the no serious obligations whatsoever throughout
24 the discovery process to comply with their basic discovery
25 obligations or the Court's very clear order directed at them to

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1 undertake this full-court press and document efforts to locate
2 and produce responsive documents.

3 THE COURT: Just out of curiosity, why did you move
4 with respect to these two to compel rather than for sanctions?
5 I guess it's -- perhaps it's both.

6 MR. CARTER: It is both, your Honor. I think when we
7 filed the initial motion, we were unclear as to whether there
8 had, in fact, been diligent efforts undertaken that simply
9 hadn't been produced. We expected that, at the close of
10 discovery, we were going to receive -- or the close of document
11 production, I should say, we were going to receive responsive
12 materials, as well as documents from these defendants
13 reflecting the efforts that they had undertaken.

14 And so when we initially moved, we thought it prudent
15 to first see what they would respond with. But when we saw the
16 oppositions, it became clear that there was nothing to support
17 any showing of a good-faith effort during the discovery
18 process, and as a result, we did, in fact, request sanctions.

19 Again, we're dealing with these defendants in terms of
20 just an initial document production. And in the case of
21 Jelaidan, you have a total of 22 documents been produced.
22 Rabita Trust is in a similar territory. As to defendant
23 Jelaidan, the scope of the discovery requests that were served
24 upon him were commensurate with his centrality to the claims in
25 this litigation. He as held principal positions in many of the

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1 purported charities that feature centrally in the claims. He
2 is, himself, according to the U.S. government, a founding
3 member of Al Qaeda with longstanding ties to Bin Laden. He has
4 relationships with a range of other designated terrorist
5 parties, which he acknowledges, including business dealings
6 that have apparently continued well after the September 11th
7 attacks.

8 And in the face of, you know, discovery requests
9 running to all of those issues, including to the numerous bank
10 accounts under his control, for which he had signatory
11 authority, we got only 22 documents, and a similar problem
12 arose with regard to Rabita Trust. That, obviously, led us to
13 the motion that we litigated back in November of 2011, where
14 the rationale he offered for his noncompliance was essentially
15 that the banks didn't want to deal with him.

16 And we set on a very clear course to try and work
17 through that issue, and the very clear course was that your
18 Honor directed that Mr. McMahon and Jelaidan's Saudi legal team
19 undertake diligent efforts at that time to reach out to all of
20 the financial institutions, identify points of contact, and try
21 and work through the problems that had punctuated discovery at
22 that point to obtain the documents.

23 At this point, that all occurred, I should say,
24 against the backdrop of, of course, the Court also setting
25 deadlines for completion of discovery, which contemplated that

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1 he would complete not only efforts to reach out to these
2 institutions, but also to have produced the documents by August
3 of 2012.

4 And when that date came and passed, there was not
5 another single document. There was not another document
6 reflecting any effort to obtain documents from the financial
7 institutions or from any other source. That brought us to the
8 present motion. And at base level, the opposition --

9 THE COURT: Which seems to have triggered some of the
10 first efforts to seek documents?

11 MR. CARTER: Well, that's correct, your Honor. At
12 base, what the opposition reflects is that it's really not a
13 response to the motion, but rather, a sudden new initiative to
14 do something to prevent the imposition of sanctions.

15 We've heard repeatedly that Mr. Jelaidan, and in
16 particular, his Saudi counsel have been engaged in diligent
17 efforts for many, many years to obtain his documents, but when
18 his Saudi counsel is called upon to attest to the nature of
19 those efforts in an affidavit submitted in response, he
20 identifies two letters; one that was submitted in August of
21 2001, prior to this litigation even being filed, which doesn't
22 request any documents; and another to a Turkish institution
23 that was sent relatively recently and only in response to a
24 letter that they sent to Mr. Jelaidan.

25 There's really not any sort of thorough

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1 documentation -- in fact, there's really no documentation from
2 the relevant period, between the date of the Court's order in
3 November of 2011 and the expiration of the period for document
4 production. There's essentially nothing. Even then, looking
5 at the effort that has been undertaken in an untimely matter,
6 after the filing of this motion, it's not even reasonably
7 calculated to produce responsive materials, and it doesn't go
8 to the scope -- full scope of the discovery he's obligated to
9 provide.

10 As we've indicated in the motion, the letters that
11 were sent were sent to a general mailing box in English at
12 financial institutions in countries where English is not the
13 first language. It reflects that there was not a point of
14 contact previously established. In addition, the letters are
15 limited to the very specific financial institutions and
16 accounts that we affirmatively identified.

17 There's not any indication that he sent any letters to
18 financial institutions that we did not become aware of through
19 our independent investigation. And what's notable is, aside
20 from a letter to the Saudi Arabian Monetary Authority, there
21 are no letters to any Saudi financial institutions whatsoever,
22 even though Jelaidan is a longtime resident and citizen of the
23 Kingdom and has resided there for many years during this
24 litigation.

25 With regard to the letter that was sent to Samba,

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1 additionally, it is curiously sent from Mr. McMahon's office in
2 English rather than it being sent from Saudi counsel, who one
3 would expect could speak to them in Arabic and promote some
4 kind of a response. The letter that was sent to Al-Rajhi
5 Banking and Financial Institution was sent solely to the
6 Malaysian branch office of that financial institution, even
7 though earlier discovery responses in litigation indicated that
8 there are accounts in Saudi Arabia under Samba's control.

9 And so what we have is just a wholesale failure to, in
10 any way, meaningfully try to comply with discovery obligations.
11 Beyond that, the letters, your Honor, don't run to any of the
12 other issues that are the subject of discovery. It's limited
13 only to this isolated area of the few bank accounts that we
14 specifically identified, but there are a range of other
15 relationships relative to which we've seen no effort on the
16 part of defendant Jelaidan to obtain responses.

17 THE COURT: Such as?

18 MR. CARTER: Well, his relationships with Yasin
19 Al-Qadi, with whom he had business relationships. There are a
20 number of commercial enterprises, Maram is one of them,
21 relative to which -- that's M-a-r-a-m -- relative to which,
22 Jelaidan was a partner with other parties of interest in this
23 litigation.

24 So, you know, these are relatively broad discovery
25 requests, and we're just not seeing an effort, aside from a few

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1 isolated things that we pinpoint to, even make any evident to
2 obtain them. And to the extent there are letters, they're
3 simply not meaningfully calculated to produce anything.
4 There's just not an indication that Jelaidan takes seriously
5 any of the obligations imposed upon him by virtue of the
6 litigation process.

7 With regard to Rabita Trust, if I can turn to that,
8 your Honor.

9 THE COURT: Yes, sure.

10 MR. CARTER: There is an even more fundamental
11 problem, and that is, that it is apparent on the record that's
12 before the Court that there has not been a person with the
13 actual authority to represent and direct the activities of
14 Rabita Trust involved in this litigation for a period of many
15 years.

16 When we were trying to get to the heart of the reason
17 for Rabita Trust failure to provide any meaningful
18 documentation, the explanations we were given from Mr. McMahon
19 early on were essentially that it was a dormant, inactive
20 charity, and that raised a number of concerns in our mind. The
21 first is, if it's dormant and he's unaware of the
22 representative who currently has control, it follows that there
23 may not be a representative who understands the duties and
24 obligations running from the discovery rules.

25 The second issue is a funding problem. If there's no

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1 one with the authority on behalf of Rabita Trust to make
2 decisions concerning this litigation, there's not going to be
3 funding necessary for the organization to fulfill its discovery
4 obligations. And, lastly, the concern about, given
5 Mr. Jelaidan's status, a one-time secretary general, who,
6 according to Mr. McMahon during our early meetings, hasn't had
7 any role in the organization for years.

8 The question is whether or not someone might be using
9 Rabita Trust as a proxy for some improper purpose, whether it
10 be exhausting resources of the plaintiffs or extending the
11 litigation, and we simply wanted to get some basic answer to
12 those questions. And we were promised repeatedly, and there
13 have been multiple communications, as is reflected in the
14 briefing pertaining, to that specific issue. In response to
15 all of those repeated inquiries and the promises, we never got
16 a sound answer to that question.

17 When we look now, though, at the full record before
18 the Court, it's apparent that Jelaidan can't possibly have
19 authority to direct Rabita Trust efforts in this litigation.
20 One of the few documents that we received in discovery, and I
21 have it here today, your Honor, is the Rabita Trust deed. And
22 the Rabita Trust deed provides that the founder of the Rabita
23 Trust is the Muslim World League, and it is establishing the
24 Rabita Trust with the consent and approval of the government of
25 Pakistan.

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1 And, in furtherance, Rabita Trust will have a board of
2 directors. That board of directors, it provides, will be
3 populated by six members from the Muslim World League and six
4 individuals appointed by the government of Pakistan. So the
5 Muslim World League and the government of Pakistan each hold
6 equal participation in the board of directors.

7 It goes on to specifically provide, your Honor, that
8 it is the board of directors that shall administer and manage
9 the trust; that the board shall take all policy decisions in
10 respect thereof; that the board is required to have meetings at
11 least four times in a calendar year; that the board at those
12 meetings is required to maintain minutes.

13 Now, defendant Jelaidan acknowledged that he's had no
14 contact with this organization for years. It's the board
15 that's empowered to represent it in these proceedings. It's
16 the board that he would have to be communicating with. If he
17 hasn't been to a meeting of the board in a number of years,
18 then it's apparent he's not active in the organization.

19 What the deed and related documents also underscore is
20 that there has not been an effort in the course of discovery to
21 pursue the most obvious channel for obtaining information
22 concerning the current organizational and operational
23 structure, as well as to locate responsive documents. Again --

24 THE COURT: Which is what?

25 MR. CARTER: -- the Muslim World League was the

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1 founder. Mr. McMahon was simultaneously, at all times,
2 representing the Muslim World League, Rabita Trust and
3 Jelaidan. All of the documents we have that provide any
4 information concerning the composition of Rabita Trust board
5 indicate that the secretary general of the Muslim World League
6 holds a position.

7 Various of the documents indicate that, at least at
8 one time, Adnan Basha, the secretary general of the IRO with
9 whom Mr. McMahon indicated he was liaising closely with regard
10 to the IIRO discovery, held a position on the board. There's
11 information that, at one time, Samir Al Radhi, who was
12 purportedly the point person for IRO's production, held a
13 position on the Rabita Trust board.

14 Yet, all of the information we have indicates that any
15 effort to obtain Rabita documents has been targeted solely at
16 contacts in the Pakistani government, and that there's been no
17 effort to go to the Muslim World League, the founder of the
18 entity, which has a controlling interest in the entity, to
19 obtain the documents.

20 The exclusion, the conspicuous exclusion of Muslim
21 world league in this process speaks further to the Rabita Trust
22 lack of good faith here. So with all of these different
23 problems punctuating this, we do think that, at this point,
24 it's apparent that this is a willful refusal to comply with
25 discovery obligations that warrants the imposition of a default

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1 judgment against Rabita.

2 THE COURT: Thank you.

3 MR. CARTER: Thank you.

4 THE COURT: Mr. McMahon?

5 MR. McMAHON: Thank you, your Honor. I think it would
6 be appropriate if we do separate out Rabita Trust and Wa'el
7 Jelaidan. Excuse me, your Honor.

8 THE COURT: Before we separate them out, as to both of
9 them back, in November of 2011 I directed that efforts be made
10 to locate and produce documents. And when I read your
11 materials, it looks like, basically, nothing happened for two
12 years, and then in February of this year there was an effort to
13 sort of paper that over by having you send letters to some
14 financial institutions.

15 It struck me that if I had retained you to produce
16 documents for me in a litigation where I was the defendant,
17 rather than me going to the bank, where I had a relationship
18 and seeking the documents, if you sent letters akin to the
19 letters that were sent to these foreign banks, even domestic
20 banks would not have produced documents.

21 So it doesn't strike me as anything approaching an
22 adequate effort to seek those documents from those financial
23 institutions.

24 MR. McMAHON: Your Honor, the reason I'm making the
25 suggestion that we keep them individually looked at is, the

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1 status of the Rabita Trust situation, your Honor, is that they
2 are then jurisdictional discovery. We filed a motion to
3 dismiss. The judge did not grant it, but he did grant their
4 application for some limited discovery, jurisdictional
5 discovery.

6 So I don't know, your Honor, whether or not you
7 currently have jurisdiction over Rabita Trust because nothing
8 has been decided with respect to that outstanding motion. And
9 the reason I say that is this --

10 THE COURT: Well, you haven't filed any motion seeking
11 to narrow the discovery, correct?

12 MR. McMAHON: No, your Honor, because it was limited,
13 I thought, jurisdictional discovery. But my point, your
14 Honor --

15 THE COURT: Let's stick with some narrow questions as
16 to the trust.

17 MR. McMAHON: Well, I'd like to, your Honor.

18 THE COURT: Who's running it today?

19 MR. McMAHON: Well, here is my problem which I was
20 going to convey to you. I'm not an expert in Pakistani law,
21 nor are these colleagues. Who can determine, for example, when
22 somebody can direct litigation pursuant to Pakistani law? That
23 is the Pakistani law governs the attorney-client relationship
24 here. Who can make a determination as to how you direct
25 somebody in litigation?

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1 Now, I took a position with Mr. Carter, Sean, that
2 many years ago I was mandated to try to dismiss out Rabita
3 Trust. Now --

4 THE COURT: Okay. And when you say were mandated, who
5 retained you for that purpose?

6 MR. McMAHON: Mr. Wa'el Jelaidan, and I have not yet,
7 your Honor, been relieved of that directive.

8 THE COURT: And when was that?

9 MR. McMAHON: Well, that was approximately eight, nine
10 years ago.

11 THE COURT: Okay.

12 MR. McMAHON: No one knows, under Pakistani law, can
13 you fire an attorney. As far as I'm concerned, I'm still the
14 attorney because, to the extent Mr. Carter has articulated this
15 view, that at least the Pakistani government is in part
16 controlling the show, if you will. The Pakistani government
17 has not indicated to me that I can no longer represent them.

18 In fact, when I was at the Pakistani -- not embassy,
19 I'm sorry -- attache in Washington, D.C., it was made clear
20 they were very happy that somebody is trying to do something
21 here. But my point is that under Pakistani law, can he tell
22 me, for example, when you can revoke a directive?

23 THE COURT: Well, I'm not sure that Pakistani law much
24 matters. We're not in a Pakistani court.

25 MR. McMAHON: But there's an attorney-client

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1 relationship, your Honor, that was started under Pakistani law
2 with respect to representing this Trust, and I can't just walk
3 away from a client. And he talks about the fact that Wa'el
4 Jelaidan has been in charge of this organization, or that it's
5 dormant. The situation your Honor --

6 THE COURT: But wait, wait. Part of representing a
7 client or part of participating in an action in the United
8 States is to play an active role in the case, and I gather your
9 position is, correct me if I'm wrong, but Mr. Jelaidan has not,
10 for a number of years, had any role in the trust; is that
11 correct?

12 MR. McMAHON: Well, your Honor, here's the facts. He
13 submitted a letter of resignation about, I don't know, four
14 years ago or so. Nothing was ever done with that letter, to
15 the best of my knowledge. I communicated with Mr. Wa'el
16 Jelaidan's attorney about that particular issue. In other
17 words, under Pakistani law, or under any law, was that letter
18 of resignation accepted, in other words, he's no longer
19 secretary general. Well, as far as I know --

20 THE COURT: Well, forget whether it was accepted or
21 not. He, to your understanding, is not acting as secretary
22 general on a day-to-day basis, correct?

23 MR. McMAHON: Up to a certain number of years ago,
24 that's correct, your Honor.

25 THE COURT: Well, you say up to. He didn't resume

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1 that role. As of several years ago, he's no longer acting as
2 secretary general? Whether he should be or not is a different
3 question, but --

4 MR. McMAHON: The problem is, your Honor, is nobody is
5 acting. Musharraf was on this board of directors when we
6 learned --

7 THE COURT: So wait, wait, wait. The answer to my
8 question is, Mr. Jelaidan is not acting as the secretary
9 general and hasn't been for at least several years, correct?

10 MR. McMAHON: That's correct, your Honor.

11 THE COURT: Okay. So then we get to the question of
12 who is acting on behalf of the trust today; do you know?

13 MR. McMAHON: I'm sorry, your Honor?

14 THE COURT: Who is acting today on behalf of the trust
15 in terms of such issues as producing documents and directing
16 what you should or shouldn't do?

17 MR. McMAHON: Well, your Honor, the communication that
18 I had solely, and I still have, is with Wa'el Jelaidan and with
19 his counsel in Saudi Arabia, in Jeddah, and those were the
20 folks that originally had, I think, some documents and some
21 communications about the Rabita Trust, and I continue to deal
22 with them, but --

23 THE COURT: But we just established that Mr. Jelaidan
24 is not actually operating as the second general of the trust.
25 So I understand he has some lingering interest in seeing that

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1 it's adequately represented, but in point of fact, he doesn't
2 speak for the trust today, correct?

3 MR. McMAHON: That's correct, Judge. And the problem
4 is that there is no trust. There is no activity. It's been
5 dormant since 1994. It was set up specifically -- and if they
6 would consult their usual research sources, the media, they
7 would find out that that entity was set up specifically to
8 bring back Pakistanis from Bangladesh. It has nothing to do
9 with directing activities toward Americans, consistent with the
10 Second Circuit, your Honor. My point is the Second Circuit
11 hasn't yet to rule on this issue.

12 THE COURT: Well, one thing both sides keep talking
13 about in their papers, which strikes me as almost entirely, if
14 not entirely, irrelevant in this case is the merits. So
15 whether Mr. Jelaidan is, you know, somebody running a harmless
16 charitable organization, or one of the world's leading
17 terrorists, is largely irrelevant to the issues before me.

18 What I'm left with is a defendant who, at some point,
19 may have retained you, but who, it appears, has abandoned this
20 lawsuit in terms of defending it because there is no nobody who
21 can direct your actions with respect to the trust today who
22 you've been able to identify.

23 MR. McMAHON: That is correct, your Honor. To the
24 extent the Pakistani government and the Muslim World League
25 direct the activities -- or could direct the activities and are

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1 empowered to do so, those are the two entities that could call
2 the shots about whether or not, I guess, I would continue as
3 counsel, now, among other issues.

4 But I'm telling you, your Honor, there's nothing going
5 on with that entity. I don't know what you do. Musharraf
6 resigned. Everybody that was on the board of directors was
7 with the Pakistani government. The Pakistani government takes
8 the position that, indeed, if you want documents, Mr. McMahon,
9 we can't help you. They're in storage someplace. My question
10 is, why can't the 9-11 attorneys pursue our allies Saudi
11 Arabia, our ally Pakistan.

12 THE COURT: Wait. The documents, and that seems to be
13 reflected in the papers, are in storage someplace. Has --

14 MR. McMAHON: What happened was --

15 THE COURT: Wait, wait.

16 MR. McMAHON: -- the Pakistani government officials
17 locked up those premises. Someone took the files, we don't
18 know who. They believe they ended up in some Pakistani
19 ministry. That's the bottom line, your Honor.

20 THE COURT: And what efforts have you or Mr. Jelaidan
21 or Mr. Jelaidan's Saudi counsel undertaken to find out where --

22 MR. McMAHON: I've sent letters to the last-known
23 address of the custodian for the records for that entity.

24 THE COURT: In English, I presume?

25 MR. McMAHON: Yes, your Honor. Well, in Pakistan, a

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1 lot of --

2 THE COURT: Let me rephrase the question. What
3 efforts have Mr. Jelaidan or his Saudi counsel undertaken to
4 determine where those documents are?

5 MR. McMAHON: Well, I think, your Honor, at my behest,
6 they have done everything they possibly --

7 THE COURT: Well, you say "I think."

8 MR. McMAHON: Well, I know they have, your Honor, but
9 it's been a futile gesture in terms of the Pakistani government
10 takes the position those records are in storage someplace.

11 THE COURT: You told me it was a futile gesture.
12 That's not telling me what exactly they did.

13 MR. McMAHON: Well, I'd have to go back and chronicle
14 it specifically, your Honor. To be candid with you, I just
15 know that efforts were made to try to get whatever documents
16 the Pakistani government had, and I said at some stage, listen,
17 I'll take this over and I'll do it because I want to find out
18 what the story is. I'll go to the embassy, and we'll find out
19 where these records are, and we'll see what we can do.

20 I've been staying in the case on this issue, I think
21 as a courtesy to my brethren. I don't need this. Those
22 documents are somewhere in the Pakistani government. No one's
23 trying to hide them. We have agreed, your Honor, to an
24 in-camera inspection. If somebody thinks that we're trying to
25 hide the ball with respect to the Rabita Trust or even Wa'el

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1 Jelaidan, but I've done what I can --

2 THE COURT: I appreciate that, but it sounds like
3 Mr. Jelaidan has instructed you to do what you can, not only
4 for himself but for the trust, and that you've made some
5 efforts in that direction. But that, in point of fact,
6 particularly if the trust, in Mr. Jelaidan's view, doesn't
7 exist anymore, there's no entity to participate in this
8 litigation and nobody who can speak for the trust in terms of
9 seeking documents, who you represent; and that, therefore, at
10 least as to the trust, a default judgment should be entered.
11 Am I missing something?

12 MR. McMAHON: Well, your Honor, I don't know what a
13 default judgment, first of all, is going to accomplish.

14 THE COURT: Probably nothing, but rather than playing
15 sort of a shell game here in terms of saying I represent an
16 entity that I haven't been in contact with -- I appreciate
17 you're trying to do what you can, but I think it just muddies
18 the waters.

19 In point of fact, you're purporting to represent a
20 defunct organization, where the organization, as opposed to you
21 or Mr. Jelaidan, who has no continuing role he says in the
22 organization, have tried to do some things to try and help.
23 But the organization itself, either through the Pakistani
24 government or through Muslim World League, has taken no steps
25 to determine where the documents are, much less produce them.

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1 MR. McMAHON: I don't know what else it can do. If
2 the Pakistani government takes the position it does, what do
3 you do, your Honor?

4 THE COURT: It may be that there's nothing to do, but
5 I think the inexorable result of that conclusion that flows
6 from that is that a default is appropriate. You know, I'm
7 willing to be convinced otherwise, but I haven't heard anything
8 yet that tells me, as to the trust, that that's not the result
9 that should obtain.

10 MR. McMAHON: You don't think that the 9-11 lawyers
11 should make an attempt to contact the Pakistani government and
12 see what they can get through their subpoena power that I can't
13 get?

14 THE COURT: Sure. I think they should do that if
15 they're interested in getting the universe of documents, but
16 that begs the question of whether a defendant, who nominally is
17 in this case, is participating in the case and going to produce
18 documents. There's nobody here who --

19 MR. McMAHON: We've produced everything we have, your
20 Honor.

21 THE COURT: No, you've produced everything
22 Mr. Jelaidan has. You haven't produced everything that the
23 trust potentially could get because you've just told me, in
24 several different ways, that the trust or the people who
25 potentially might speak for the trust, haven't done anything as

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1 opposed to you or Mr. Jelaidan around the edges trying to do
2 some things.

3 MR. McMAHON: Well, your Honor, the trust has been
4 dormant since 1994; that's 13 years ago.

5 THE COURT: So why are you fighting me on the notion
6 of a default being entered against the trust? Correct me if
7 I'm wrong, I presume the trust hasn't been paying you legal
8 fees --

9 MR. McMAHON: That's correct, your Honor.

10 THE COURT: -- for a number of years.

11 MR. McMAHON: That's correct, your Honor.

12 THE COURT: So I'm not quite sure why we're having
13 this -- I was going to say argument; I'm not sure it rises to
14 the level of an argument, but why we're having a dispute here
15 when --

16 MR. McMAHON: Well, to the extent the trust cannot
17 access any more documents that it already has, or Wa'el
18 Jelaidan can't produce any more documents than he already has,
19 or Wa'el Jelaidan's attorney can't produce any more documents
20 than he already has, what are they supposed to do?

21 THE COURT: Well, you said that we're in
22 jurisdictional discovery as to the trust; so if I wanted to
23 hold a hearing, say, tomorrow on the issue of whether there's
24 jurisdiction to proceed against the trust, what are you in a
25 position to put on at that hearing?

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1 MR. McMAHON: That we've complied in a reasonable
2 fashion with everything that the plaintiffs have served us with
3 in terms of jurisdictional discovery.

4 THE COURT: But that speaks to discovery. As to the
5 issue of jurisdiction, it sounds like you'd have no witnesses,
6 and except for 22 pieces of paper, you'd have no documents,
7 correct?

8 MR. McMAHON: Well, there's a complete history of what
9 this organization is all about, your Honor. It was set up by
10 the Pakistani government in 1992. '94 they stopped funding it
11 because of politics. They bring back Pakistanis from
12 Bangladesh. What in God's name does that have to do with
13 attacking or purposeful activity towards America? I'm just
14 astounded by the fact that it's still in this case.

15 THE COURT: Well, I've indicated what I'm likely to do
16 with respect to the trust. Let's talk about Mr. Jelaidan
17 himself. One thing that appears, although I haven't seen what
18 you've offered to produce in-camera, but just taking what is
19 part of the record on this motion, it looks like Mr. Jelaidan
20 did nothing between November 16th of 2011 and February 21st of
21 2013, more than two years.

22 MR. McMAHON: That may be a result, your Honor, of
23 some --

24 THE COURT: Start again.

25 MR. McMAHON: I'm sorry. It may be the result of some

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1 communication between us that I was trying to basically carry
2 the water here in terms of getting to the bottom of these
3 documents with the banks and everything. I was informed many
4 years ago, when I sent off a letter to the Swiss bank account,
5 that they just don't deal with him in certain ways.

6 I've had experience that maybe they haven't had.
7 Banks are skittish, your Honor, overseas. They don't want to
8 touch an American lawyer. You mention anything about America
9 and they freeze up. They don't want to have anything to do --

10 THE COURT: Well, I'm not surprised that letters sent
11 to foreign banks by an American lawyer, particularly to a
12 generic address, yielded no results. But, for example, as
13 Mr. Carter pointed out, there are a number of institutions
14 potentially in the Kingdom, which I gather is where
15 Mr. Jelaidan --

16 MR. McMAHON: Which Kingdom are you talking about,
17 Saudi Arabia, your Honor?

18 THE COURT: Yes, which is where Mr. Jelaidan is these
19 days; is that correct?

20 MR. McMAHON: He is -- he is, your Honor, yes.

21 THE COURT: One thing that didn't happen is
22 Mr. Jelaidan strolling down the street and say I'd like to get
23 copies of my own banking records. I'm not saying that that
24 would have --

25 MR. McMAHON: I believe he submitted an affidavit way

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1 back, your Honor, when all this started percolating about the
2 fact that he's tried to secure information but he hasn't gotten
3 any. So the government is --

4 THE COURT: I don't have any such thing as -- do I, as
5 part of the papers in opposition to this motion?

6 MR. McMAHON: Well, I'm pretty sure, your Honor, we
7 had him submit something to the extent that he has had any
8 dialogue or dealings with the Saudi government in terms of
9 trying to get a travel restriction lifted. In other words, if
10 he could travel himself to Switzerland, he wanted to do that to
11 meet with the banks and --

12 THE COURT: Suddenly you jumped from Saudi Arabia to
13 Switzerland. I was asking about efforts he's made in Saudi
14 Arabia to deal with Saudi institutions relating to his bank
15 accounts --

16 MR. McMAHON: Yes, your Honor.

17 THE COURT: -- and suddenly I find myself in
18 Switzerland.

19 MR. McMAHON: As I recall, your Honor, we had
20 something from him in the form of an affidavit of some kind,
21 and he basically had tried to cooperate with or receive the
22 cooperation of the Saudi government, and he was stonewalled
23 there. He got nothing.

24 THE COURT: Well, the record in this case is
25 sufficiently voluminous that I'm not going to go through the

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1 zillions of documents that have been filed and the attachments
2 thereto. If there's some such affidavit, I suggest you get it
3 to me quickly.

4 MR. McMAHON: And the content of that affidavit, your
5 Honor, is simply that he attempted to make some contact with
6 the Saudi government official and was basically boxed out,
7 couldn't get any records, or --

8 THE COURT: Well, that speaks to his effort to contact
9 a Saudi official, not to his efforts to deal with his banks
10 directly.

11 MR. McMAHON: Are you talking about Saudi banks, your
12 Honor?

13 THE COURT: Yes. I mean, Mr. Carter made the point
14 that bank records are not all that they seek, but it's
15 certainly one --

16 MR. McMAHON: Your Honor, can we talk about that for a
17 second? What good is a bank statement? Suppose I have an
18 account in a Switzerland bank and I had \$10 in it ten years
19 ago, and I'm Wa'el Jelaidan. I now have \$12 in it. What are
20 they going to do with that information with that bank
21 statement? Because that's the only thing Mr. Gurule says we
22 can get, basically, financial records, I guess, but we could
23 get a statement of the account.

24 You've got to ask yourself, your Honor, what are we
25 fighting over here? Does the account now have \$12? We'll

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1 stipulate it has \$12.

2 THE COURT: Well, suppose the account had \$100,000 and
3 a check was written to somebody who was in the United States in
4 a way that the plaintiffs believe they can show was terrorist
5 related? We're talking about hypotheticals without knowing
6 what the documents are. You're asking me to --

7 MR. McMAHON: This is not a hypothetical, your Honor.
8 This is the bank saying, okay, I'll give you a statement, say.
9 They're going to give us, according to Gurule, they can give us
10 a statement of account. In other words, there's now \$12,000 in
11 that bank account. Are you happy?

12 THE COURT: In November of 2011 I directed that
13 efforts be made to obtain bank documents. Here we are in March
14 of 2013, and you're telling me that you've been told that you
15 could get some documents, but I guess you or Mr. Jelaidan or
16 somebody decided they're not relevant; so you haven't produced
17 them.

18 MR. McMAHON: No, your Honor. No. You're missing the
19 boat here. Professor Gurule said that we can get statements of
20 the account.

21 THE COURT: Oh, okay.

22 MR. McMAHON: So I'm saying suppose ten years ago the
23 account had \$10. It now has \$12.

24 THE COURT: So you're not disputing his statement that
25 you could get those statements, correct?

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1 MR. McMAHON: Well, I don't know. He says it. That's
2 his opinion. I don't know.

3 THE COURT: Well, what efforts did you make, other
4 than sending a generic --

5 MR. McMAHON: Well, I'd have to hire an expert, your
6 Honor, who's quite expensive, to counter his opinion. I mean,
7 this is not rocket -- I mean, it is rocket science in terms
8 of --

9 THE COURT: Somehow again we found ourselves in
10 Switzerland. And as to the Saudi banks, apart from this
11 earlier document that was not submitted in opposition to the
12 current motion, the only things that happen to seek documents
13 from the Saudi banks, that I'm aware of, are that in February
14 of 2013, a couple of weeks ago, you submitted some letters in
15 English to the banks, not directed to specific people. Am I
16 missing something? Let me hear from Mr. Carter.

17 MR. CARTER: Your Honor, with apologies, the discovery
18 process, both with Jelaidan and Rabita, is a little like trying
19 to nail jelly to the wall and, you know, it's exhausting and
20 it's time consuming.

21 The affidavit, as I understand it that Mr. McMahon is
22 talking about that Mr. Jelaidan submitted of records to
23 document his efforts, is the affidavit he submitted in October
24 of 2011, which the Court passed upon in November of 2011, and
25 said the activities described in this affidavit and in your

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1 response are fundamentally inadequate.

2 And it was the inadequacy of all of those descriptions
3 of activities that led the Court to tell Mr. Jelaidan, right
4 now, go out and thoroughly document, in a way that the
5 plaintiffs can track and see whether or not there's been good
6 faith effort, attempts to obtain responsive documents. And
7 there is nothing that Mr. McMahon has said in the course of
8 this --

9 THE COURT: And I apologize. That is the affidavit
10 that's part of the materials here. I didn't look at the date
11 on it. I should have.

12 MR. CARTER: That's correct, your Honor. It's
13 October.

14 THE COURT: That's the -- I guess it's October 29th,
15 2011, affidavit.

16 MR. CARTER: So in effect, your Honor, we're just
17 re-litigating and arguing over the issues that we already
18 disposed of in November of 2011, and the record going forward,
19 the relevant record, is that nothing's been done.

20 MR. McMAHON: Would you be satisfied, your Honor, if
21 we received a letter from somebody in Saudi Arabia, whoever
22 they want, the plaintiffs, whatever official they want that
23 says we're not going to give any records to our citizen named
24 Wa'el Jelaidan? What is it that he'd have to get from the
25 Saudi government to satisfy you, your Honor?

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1 THE COURT: Well, I'm not going to tell you how to
2 litigate this case. A motion was filed. There was an
3 opposition to it. The only thing from Mr. Jelaidan that I have
4 is this two-year-old affidavit, and I'm going to decide the
5 case on the record that I have -- let me correct that.

6 I'm going to decide the motion on the record that I
7 have, with the exception that I told you, if you wish to submit
8 some documents in-camera to me to show further efforts, I'm
9 glad to review that. Do you wish to do that?

10 MR. McMAHON: Yes, your Honor. We do.

11 THE COURT: Okay. Within one week? Okay?

12 MR. McMAHON: I need at least two weeks, your Honor.
13 I'm not feeling great, and it's --

14 THE COURT: Okay. Two weeks.

15 MR. CARTER: Your Honor, obviously, we trust the
16 Court's review, but the difficulty remains that the efforts
17 were supposed to have been documented in a way that we could
18 review them, and we're not going to get that; so I guess we'll
19 cross the next bridge.

20 THE COURT: If it moves me, then we'll have to deal
21 with that. If it doesn't, it's sort of a moot point.

22 MR. McMAHON: The only thing, your Honor, I would
23 offer in terms of, before you would enter a default judgment or
24 some severe sanction, is that we can make Mr. Wa'el Jelaidan --
25 because we have nothing to hide, apart from the in-camera

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1 inspection offer, your Honor, we can make Mr. Wa'el Jelaidan
2 available for a full-blown document discovery deposition by the
3 9-11 lawyers.

4 They can ask their questions until the cows come home,
5 and then you won't be involved in the middle here trying to,
6 you know, ferret out what does that mean? In other words, give
7 them an opportunity to confront Mr. Jelaidan about this
8 particular issue, what did you do with the Saudi government.
9 Let him explain, and I won't be involved -- I mean, I'll be at
10 the table, but I think it would be very helpful to hold off on
11 that until such time that they have a chance to depose him and
12 have all these questions answered.

13 MR. CARTER: Your Honor, we're back to the scenario
14 where there's a very specific order, and Mr. McMahon's response
15 to that is, I have another idea, why don't we do this instead?
16 There's an imperative that parties to litigation follow the
17 Court's orders, and the history of this litigation sort of puts
18 an exclamation point on that requirement.

19 MR. McMAHON: He hasn't called me a repeat offender
20 yet, your Honor; so....

21 No, but I think there are situations where I'm caught
22 in the middle, whether it's the Rabita Trust or Wa'el Jelaidan,
23 and maybe I'm not completely explaining to your Honor's
24 satisfaction, and I apologize, some of the nuances of the stuff
25 that we're involved with dealing with somebody in Saudi Arabia.

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1 So I was thinking maybe, bright idea No. 1, let them
2 depose this guy and then find out from their own questions,
3 gee, that's the answer. Okay.

4 THE COURT: But I gather what you're proposing is a
5 deposition which is limited to what he did or didn't do in
6 terms of responding to the document demands?

7 MR. McMAHON: Well, I think, your Honor, you're
8 talking about the parameters of what's going to be in a
9 deposition. We're not going to today say you can't do this,
10 that or the other thing. You can't get into substantive
11 issues, obviously, but anything pertaining to discovery, they
12 would be perfectly --

13 THE COURT: Well --

14 MR. McMAHON: -- entitled to.

15 THE COURT: As you view the state of play, the current
16 substantive issue is jurisdictional; is that correct? At least
17 as to the trust, maybe not as to Mr. Jelaidan. I'm not sure
18 where we stand in terms of him.

19 MR. McMAHON: Mr. Jelaidan has no pending
20 jurisdictional issue like the Rabita Trust, your Honor.

21 THE COURT: Yeah, but you're not proffering him, or
22 are you, for all purposes?

23 MR. McMAHON: No, your Honor. I'm proffering him for
24 this, that under discovery and discovery obligations that we
25 have, he will comply with any questions that are posed to him,

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1 subject to attorney-client privilege, obviously.

2 THE COURT: Even though he doesn't have a
3 jurisdictional motion pending, you're not proffering him at
4 present for all purposes, correct?

5 MR. McMAHON: Right, your Honor. I'd have to give
6 that some thought. This is not -- Like I say, I'm --

7 THE COURT: Well, you're not at the present moment,
8 and based on that, I take it your answer, Mr. Carter, is the
9 same as you just told me, correct?

10 MR. CARTER: It would be, your Honor. And,
11 additionally, just a point of clarification, Mr. McMahan's
12 offered to share with the Court in-camera some correspondence,
13 we would object to any briefing relating to that or
14 supplemental declarations postdating the underlying efforts.
15 We think this should be restricted.

16 THE COURT: No, the only thing I would entertain is
17 the documents and, if need be, translations.

18 Anything else that we should be taking up today?

19 MR. McMAHON: Your Honor, I want to just clarify.
20 There's no type of letter that you would be satisfied with that
21 would come from the Saudi government pertaining to all of these
22 issues that he has raised, that we've examined the following,
23 you can't have your files, you can't do this, you can't do
24 that?

25 THE COURT: Well, the Saudi government would not be

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1 speaking for the banks and would not be speaking for banks in
2 countries other than in Saudi Arabia, just by the way of
3 example. So it's difficult to envision what the Saudi
4 government could submit that would speak to all of the numerous
5 complaints that the plaintiffs have here.

6 But in any event, there was a briefing schedule for
7 this, and I don't have any such letter before me.

8 When is the next conference before Judge Daniels?

9 MS. BERGOFFEN: It's scheduled for April 15th, your
10 Honor.

11 THE COURT: Okay. Have I scheduled a conference for
12 that same day?

13 MS. BERGOFFEN: We would appreciate that, your Honor.

14 THE COURT: Let me just make sure that that's okay.

15 (Pause)

16 MR. HAEFELE: Your Honor, there's --

17 THE COURT: Hang on a second.

18 (Discussion off the record)

19 THE COURT: What time has Judge Daniels scheduled?

20 MS. BERGOFFEN: I believe it's 11:00 a.m. Your Honor,
21 there is a pending motion to compel with regard to a privilege
22 log. We've served it on, I believe, February 26th. So there's
23 time to complete that briefing in advance of the hearing. We
24 expect that it will be, in fact, ripe at the April 16th
25 conference.

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1 THE COURT: So whether or not the conference goes
2 forward before Judge Daniels, I will hold a conference on
3 April 15th sometime after 11:00 a.m.

4 MS. BERGOFFEN: You said 15th, your Honor, just to be
5 clear --

6 THE COURT: 15th.

7 MS. BERGOFFEN: 15th, okay.

8 THE COURT: Sometime after 11:00 a.m.

9 MR. HAEFELE: And, your Honor, just so it is clear, I
10 am under the impression that there isn't going to be adequate
11 time to have any briefing time for that. I know what counsel
12 said, and again, we had planned on meeting and conferring after
13 this, but I was under the impression that that motion had been
14 withdrawn and there would be a new -- I understand they may
15 have some disputes, but we haven't met and conferred on the
16 issue. I don't know that there's a motion pending.

17 MS. BERGOFFEN: Your Honor, there's certainly a motion
18 pending. We are continuing to meet and confer to try to narrow
19 the issues with regard to that briefing, but it was fully
20 submitted to opposing counsel as of the end of February, and it
21 certainly will be ripe.

22 The position is actually due today. We've agreed to
23 give a potential extension on the due date for the oppositions
24 so we can continue to meet and confer. So I don't see any
25 scenario in which their opposition and our reply won't be fully

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1 briefed in advance of April 16th.

2 THE COURT: I'm not going to worry about that today.
3 Certainly, the motion hasn't been withdrawn. So I'll wait to
4 see what the result of your discussion is, and if there's a
5 dispute as to whether it should be heard that day, I'll deal
6 with that, and you can inform me on that.

7 MS. BERGOFFEN: Just to clarify, you had mentioned the
8 15th. So you're anticipating doing it on the day before Judge
9 Daniels' conference?

10 THE COURT: Oh, I thought you said the 15th.

11 MS. BERGOFFEN: Sorry if I wasn't clear. It's the
12 16th.

13 THE COURT: I may have misheard you. Let me check
14 again. I guess I have April 15th on my mind. Yes. For some
15 reason, I don't have anything in this case on my calendar, but
16 I can put it on. So subject to whatever may be raised with me
17 later on about whether it should be held or not, at the present
18 whether or not Judge Daniels holds his conference that day, I
19 will hold a conference at 11:00 or thereafter on April 16th.
20 Okay? Thank you all.

21 MR. HAEFELE: Thank you, your Honor.

22 MR. CARTER: Thank you, your Honor.

23 MR. GOLDMAN: Thank you, your Honor.

24 MR. KABAT: Thank you, your Honor.

25 MS. BERGOFFEN: Thank you, your Honor.
(Adjourned)